Chapter 3

Environmental regulatory tools in OECD and EaP countries

This chapter looks at developments in environmental regulatory tools and how different approaches can more effectively support compliance. It begins with an exploration of changing trends in many OECD countries around simplifying environmental regulatory requirements for SMEs. These countries are doing so by replacing bespoke environmental permitting with standardised requirements (e.g. general binding rules) for specific activities with low environmental risk, provided that they involve a large number of operators and employ similar technologies. The chapter also looks at reducing the administrative burden on SMEs through collaboration between environmental and non-environmental regulators on identifying opportunities to reduce duplication in paperwork and conduct joint or delegated inspections in selected sectors. The increased effectiveness of a sector-based approach is also explored in the chapter, as part of a broader customer service perspective on the relationship between environmental regulators and SMEs.

Introduction

How environmental regulators approach low and high risk facilities can make a vital difference in allocating resources to support environmental compliance. Usually, environmental regulators do not have strategies that apply only to low-risk facilities – they simply have fewer resources to spend on them than on high-risk sites. However, an increasing number of environmental regulators in OECD countries are establishing special regimes for low-risk installations, the vast majority of which are SMEs.

Though permitting remains the dominant approach to regulating in most OECD countries, there has been a rapid expansion of standard rules – from simplified permitting to activity-based requirements without mandatory notification of the regulator – impacting a large number of SME sectors. Smaller businesses, often with limited in-house regulatory capacity, benefit from a standardised, rules-based approach to setting environmental requirements. It provides more certainty about the most effective way to achieve compliance than do individual, bespoke permits. Rule-based regimes also have other benefits, including reduced bureaucracy and costs to the regulator and the absence of impact on the level playing field within an industrial sector.

Shifting approaches to environmental regulation of SMEs in OECD countries

The trend to simplify regulatory requirements for SMEs is well illustrated by the introduction in 2009 in France of a new environmental regulatory regime – registration – for installations that present risk significant enough to justify its prior evaluation but that can be addressed through standardised regulatory requirements.[1] By the end of 2014, 35% of installations previously covered by permitting requirements were planned to be transferred to the registration regime. This is done for specific activity sectors (e.g. warehouses, petrol stations, drycleaners, small distilleries), activity volume thresholds being applied where necessary. The introduction of this new regime was the result of a gap between the administrative formality of a declaration and the extremely rigorous process of authorisation (permitting). The registration still requires the submission of an application and a simplified public consultation, but it has increased the predictability of the requirements and reduced the application processing time.

Another example of simplified permits is found in England and Wales, where local authorities issue air pollution permits to small businesses. The Department of Environment, Food and Rural Affairs (Defra) produces guidance notes for each of the 80 sectors regulated by local authorities. Developed by technical working groups in collaboration with business organisations, these guidance notes contain the descriptions of relevant best available techniques and emission limit values. In order to maintain a level playing field between local authorities across the country they are generally quite prescriptive.

Regulatory regimes for setting environmental requirements are usually organised in tiers based on the level of a facility's risk. In Scotland, SMEs that are not subject to integrated permitting can be regulated by simple licences/permits (with template conditions), a registration regime (involving a notification with information on who is engaging in relevant activities), or general binding rules (GBRs) where lower-risk activities (e.g. discharge into a surface water drainage system, storage and application of manure and fertilisers, etc.) do not require notification of the environmental regulator.

While the simplified permitting procedure always involves a formal application from the operator, which is approved by the regulatory authority at the sub-national or local level (although agencies in many countries increasingly use straightforward online application

forms tailored to individual sectors), rules-based regimes may or may not require notification of, or registration with, the competent authority. ***Rules that require operators to notify, or register with, the competent environmental authority before engaging in an activity are preferable*** in terms of the regulator's knowledge of the regulated community and control over its potential environmental impacts.

Box 3.1. **General binding rules in the Netherlands**

In the Netherlands, there are different requirements for three categories of installations (defined in a 2008 government decree):

- Type A facilities, characterised by minimal environmental impact, are regulated by general, not activity-specific provisions; they do not need to notify the competent authority of their operations
- Type B installations have a moderate environmental impact, are covered by activity-specific GBRs and are required to notify the competent (local or provincial) authority of the nature and size of its activities four weeks before starting operations
- Type C installations have a potentially important impact and require an environmental licence which they have to comply with along with applicable activity-specific GBRs (this category includes large installations which are subject to the EU Industrial Emissions Directive and need an integrated permit/licence).

GBRs establish "quantitative target-based provisions" (i.e. emission limit values) that can be achieved by any "recognised" measure without prior consent from the competent authority as well as "qualitative" provisions that require certain specific techniques or management practices that can be modified only with the competent authority's consent.

GBRs have been developed for activities related to hazardous substances, plastics, metals, paper and textiles, food products, vehicles and other motorised equipment, etc. The range of activities subject to GBRs is expanding every year until 2016.

Source : Ministry of Infrastructure and the Environment, responses to the OECD questionnaire, January 2012.

There is no standard terminology to describe rules-based regulatory regimes across OECD countries. Terms such as "registration" and "general binding rules" mean different things in different systems. For example, in some countries (see Box 3.1, Type B installations for an example in the Netherlands) GBRs are defined as standard conditions specific to a type of activity or a sector with obligatory notification of environmental authorities before engaging in an activity. However, in others (e.g. in the UK) GBRs do not impose such a requirement. In the latter case, the system is similar to that of exemption from permitting, where the regulator does not know who is engaging in an activity to which the rules apply and how much low-risk activity is being conducted overall.

The following principal criteria should be applied when the use of GBRs or other rules-based regimes is considered for a segment of the regulated community:

- Rules must cover a sufficiently large number of regulated entities in a particular sector to make this regulatory regime effective.
- The state of technology and techniques in that sector must not be fast moving, as rules cannot be updated frequently.
- The facilities must have a similar, low-risk environmental impact.

Even a GBR regime with mandatory notification does not always give enough information to the regulator. Installations under the "declaration" regime in France are subject to GBRs that are laid out in standardised ministerial orders (*arrêtés-types*). These requirements are attached to the formal acknowledgement of receipt of a declaration which is sent by the prefect to the operator. In some cases, they may be made more stringent by an order of the prefect to reflect local conditions. However, the inspection services do not usually have an opportunity to review a declaration or recommend rejecting it. There is a consequent problem of the lack of knowledge of low-risk SMEs by environmental regulatory authorities.

The notification issue can be addressed by requiring operators to regularly assess their own compliance with the rules and submit a respective statement to the competent environmental authority. For example, the Small Quantity Hazardous Waste Generator Education and Self-Certification Program in the US state of New Hampshire (in place since 2003) requires the state's approximately 3 700 enterprises to conduct a facility assessment every three years and provide a declaration to the New Hampshire Department of Environmental Services that the company is in compliance with the applicable rules.

The pilot project on SME greening in Ukraine produced guidance on simplified environmental regulation for SMEs. This guidance (Chapter 9) presents several simplified regulatory regimes suitable for installations with low environmental impact, including GBRs and registration. It also identifies appropriate economic sectors for simplified environmental regulation and analyses the implications of their introduction in Ukraine.

Better regulation initiatives for small businesses

Small businesses often complain that keeping up to date with environmental requirements is burdensome, particularly in relation to understanding which requirements apply in their individual context. Finding guidance and advice explaining what they have to do to comply with given regulations is difficult. SMEs often feel that they are not supported enough and are unreasonably expected to cope with the same levels of paperwork and obligations as larger companies. Businesses generally express support for a customer-focused relationship between regulators and the regulated with the primary goal of compliance rather than enforcement. Improved information for regulated entities has been consistently identified as the most important factor for reducing the administrative burden on businesses (EA, 2011).

A recent UK survey (Defra, 2011b) suggests that micro-businesses spend more time on activities associated with demonstrating compliance (preparing for inspections, completing paperwork, record-keeping) than actual activities to comply with regulations. Despite efforts to reduce unnecessary duplication of inspections, business are still often required to provide the same information more than once in demonstrating compliance with regulations.

Similarly, the first of the UK Government's five principles of better regulation[2] is the proportionality of regulation, which presumes regulating small businesses only where necessary and with practical exemptions. For rules that will have a significant impact on small businesses, soliciting their input at the drafting stage reduces eventual adverse effects. The US Small Business Regulatory Enforcement Fairness Act (1996) provides SMEs with an expanded opportunity to participate in the development of certain regulations. Some European countries require regulatory agencies to prepare special statements on the potential impact of proposed regulations on small businesses.

Listing the full range of regulations that have an impact on small businesses in selected sectors helps to identify opportunities to reduce duplication in paperwork and/or

processes among regulatory authorities. Among different ways to simplify the administrative requirements for reporting on environmental issues and avoid duplication of requested information are the creation of nationwide information registration systems accessible by all competent government authorities, the introduction of e-government to replace paperwork documentation, and the implementation of the "one-window" approach for issuing appropriate permits and licences to businesses (e.g. through local authorities). Offering compliance-related information to businesses (Chapter 4) also contributes to better regulation by reducing their transaction cost of compliance.

Incentives for environmental management certification

While the main driver for businesses to have a certified environmental management system (EMS) is market demand from customers and clients (the adaptation of EMSs to the specifics of small businesses is addressed in Chapter 4), environmental authorities may offer additional regulatory incentives:

- The adoption of an ISO 14 001 EMS or a similar standard may entitle operators to certain ***privileges in the permitting process***. In the Netherlands, EMS-certified operators can apply for licences that are less detailed and prescriptive. Several EU countries (e.g. Italy, Slovakia) issue permits with longer validity periods and with reduced reporting requirements to EMAS-certified companies (EC, 2004b).
- The US EPA's Small Business Compliance Policy allows small businesses to obtain ***reductions in monetary penalties*** if violations are discovered by any voluntary means, including government-sponsored on-site compliance assistance activities or environmental audits,[3] EMSs, use of online compliance assistance tools, etc. In Austria, administrative fines are waived for businesses with a certified EMS if they detect non-compliance during an internal audit.
- ***The inspection frequency*** may also be directly or indirectly linked to the presence and quality of the operator's EMS. Companies with a certified EMS enjoy reduced inspection frequency in Norway, and in France installations registered with EMAS (there were only 17 such installations in April 2011) are exempted from routine compliance inspections. In Korea, "green companies" designated by the Ministry of Environment are exempted from routine environmental reporting, and their inspection frequency is reduced.

Still, while there is some reliance on EMSs to facilitate compliance, the experience of many regulators (e.g. in the UK and the US) is that an EMS is far from being a guarantee of compliance (especially since ISO 14 001 does not account for compliance). Therefore, there may not be sufficient reason for special treatment of EMS-certified businesses in compliance monitoring.

Sectoral approach to compliance assurance

Regulatory requirements (such as GBRs) are usually driven by the type of environmental impact, although they tend to affect specific sectors. However, compliance assurance in general and particularly compliance promotion are predominantly sector-based. Small businesses typically respond only to messages adapted to their activity sector (discussed further in Chapter 4) which makes the sectoral approach crucial in promoting compliance and green practices among SMEs.

A growing number of environmental enforcement authorities produce sectoral strategies that seek to optimise the balance between the three pillars of compliance assurance – compliance promotion, monitoring/assessment and enforcement – in relation to the needs and challenges of a specific segment of the regulated community. As a result, a significant share of compliance monitoring/assessment activities is becoming sector-based, although it continues to rely on impact-based regulations.

In many sectors, themed and special inspections (inspection campaigns) have been increasingly used to monitor low-risk sites or activities. ***Rotating sector-specific campaigns could be a strategy for maximising the impact of limited agency resources.*** Such campaigns can create the impression of a substantial regulatory capability and threat of enforcement, with a very limited regulatory resource commitment. It is advisable to ***link awareness campaigns and inspection campaigns***: the former give businesses information to comply while the latter, after a certain period, seek to establish a level playing field through compliance monitoring and enforcement. However, inspectors taking part in such an inspection campaign should not focus exclusively on thematic risks but also pay attention to site-specific risks and requirements.

Reliance on complaints and reports from the public remains a necessary and even, given the resource constraints, inevitable part of compliance monitoring of SMEs. However, while complaints have the potential to uncover new risks and risk-posing businesses, they are often driven by immediate concerns that may not be related to the regulators priorities or even fall under its mandate, thus dissipating agency resources.

In order to optimise compliance monitoring of non-complex, low-risk installations, it is advisable for environmental enforcement authorities to co-operate with non-environmental regulators and private sector organisations in their inspection activities. For example, Scotland's Environmental and Rural Services (SEARS) partnership of eight Scottish regulators with competencies over the farming and forestry sectors ensures co-ordinated inspections and streamlined reporting procedures. SEARS partners arrange joint visits or entrust one or two of the partners to inspect the aspects that are normally under the other organisations' jurisdiction. They also share information provided by the farmers and other relevant businesses, thereby reducing the administrative burden on the regulated community, and co-ordinate the handling of customer enquiries. The Scottish Environment Protection Agency (SEPA), the environmental regulator, trains staff of other partner agencies that conduct regular site visits according to their own mandates but also perform certain environmental regulatory responsibilities delegated by SEPA.

Outsourcing of compliance monitoring to non-government bodies may be more appropriate at the local level, where competent authorities often lack capacity to properly exercise this function. In Ireland, Dublin City Council has appointed a contractor to implement its Fats, Oils and Grease programme to reduce grease discharges from food service establishments (pubs, restaurants, hotels, etc.), thereby preventing blockages in the public drainage network. The contractor's role is to identify premises that require an effluent licence, to advise the operator on best management practices, and to inspect the premises four times a year to ensure compliance with licence conditions. In putting in place such an arrangement, the competent governmental authority should set clear requirements for the contractor's performance and review it periodically.

Conclusion

Across the OECD, countries are moving to simplify environmental regulatory requirements for SMEs. Most commonly, this is being done by a shift from permitting requirements to rules-based regimes aimed at specific activity sectors and for specific thresholds. There are substantive differences among countries in terms of how GBRs are defined and implemented, including whether they are administered through national, sub-national or local government, how and when notification is required, and how facilities are defined. Although GBRs are usually environmental impact-driven rather than sector driven, taking a sectoral approach to compliance assurance and information helps ensure success. Simplified EMS systems can help SMEs with better environmental practices, but they are not guarantors of environmental compliance. Ultimately, implementing better regulation that reduces the burden on both SMEs and regulators depends not just on the regime but on co-ordination among regulatory bodies, and consultation with industry groups.

Notes

1. In this case, the term "registration" refers to a simplified permitting regime.
2. PACTT principles of better regulation: proportionate, accountable, consistent, targeted and transparent (BRE, 2010).
3. The EPA Audit Policy prescribes, among others, an audit protocol which summarises key statutory requirements and contains a regulatory checklist with detailed procedures for conducting an audit of facility operations.

References

Defra (2011a), *Business Perspectives on Approaches to Securing Compliance*, Greenstreet Berman Ltd. report for Defra and Environment Agency, Department for Environment, Food and Rural Affairs, http://randd.defra.gov.uk/Document.aspx?Document=CL2463EADefraBusinessapproachestocomplianceR2V6FCA.pdf.

Defra (2011b), *Micro businesses and environmental regulation*, Final Report prepared by GHK Consulting Ltd. for Defra, Department for Environment, Food and Rural Affairs, http://randd.defra.gov.uk/Document.aspx?Document=Deframicrobusiness_FINALREPORT.pdf.

EA (2011), *Effectiveness of Regulation: Literature Review and Analysis*, Report SC090028, Environment Agency, Bristol, UK, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290502/scho0911bubh-e-e.pdf.

EA (2009), *Understanding and Improving SME Compliance*, Report SC080017/R2, Resource efficiency programme, Evidence Directorate, Environment Agency, Bristol, UK, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/291208/scho1209brpv-e-e.pdf.

EC (2007), *Small, clean and competitive: A programme to help small and medium-sized enterprises comply with environmental legislation*, Case studies and good practices in environmental compliance assistance, Commission staff working document, European Commission, Brussels, 8.10.2007, ec.europa.eu/environment/archives/sme/pdf/exec_summary_en.pdf.

EC (2004), Annex to the *Report from the Commission to the Council and the European Parliament on Incentives for EMAS Registered Organisations*, Commission Staff Working Document, European Commission, Brussels, http://ec.europa.eu/transparency/regdoc/rep/1/2004/EN/1-2004-745-EN-F1-1.Pdf.